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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1982

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SUPREME COURT, U.S.

Case No. 82-6733

PAUL EDWARD MAGILL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER

PHILIP J. PADOVANO
1020 East Lafayette Street
Post Office Box 873
Tallahassee, Florida 32302
904/224-3636

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REASONS FOR GRANTING THE WRIT

The reasons which warrant the granting of the Writ are set forth in the Petition. No attempt is made here to expand upon those arguments. This Reply has been filed soley to address the new arguments raised by the Respondent in the Brief in Opposition.

I

The Respondent urges the Court to reject the Petitioner's claim that the death penalty cannot be applied constitutionally to a person under the age of eighteen at the time of the

offense (Petition Point One) on the ground that it was not presented to or decided by the Florida Court. This contention is without merit for the issue was in fact presented to the State Court. Moreover, it appears from the face of the Florida Supreme Court Opinion that the question was considered and rejected.

The Petitioner has consistently maintained that the imposition of the death penalty would be consitutionally impermissible in view of his age. He contended in his Brief in the Florida Supreme Court in the first state appeal (Fla.Sup.Ct. No. 51,699) that his death sentence violated the Eighth and Fourteenth Amendments because the death penalty was not applied to other "juveniles" who were similarly situated. (Appellant's Brief p. 97-100). In another portion of that brief his attorney suggested to the Court that "youthful age alone may be such a significant mitigating circumstance that death could not be considered the appropriate sentence." (Appellant's Brief p. 95). In the second appeal to the Florida Supreme Court, after the remand and resentencing to death, (Fla.Sup.Ct. No.51,699) the Petitioner once again urged that the Trial Judge erred in his failure to give proper consideration to his age. (Appellant's Brief p.10-12).

The justices of the Florida Supreme Court were advised during oral argument of the second appeal that this Court had (then recently) granted certiorari in Eddings v. Oklahoma 455 U.S. 104 (1982) on the issue of whether the death penalty could be applied under any circumstance to a person under the age of

eighteen.[1] They were asked to carefully monitor the case in view of its obvious applicability and particularly in view of fact that the argument relating to Petitioner's age was the most "critical" aspect of the case.[2]

It should be fair to say that the majority opinion of the Florida Supreme Court affirming Petitioner's sentence of death constitutes a rejection of the argument that the consitution forbids the impostion of the death penalty in all cases upon those who have not attained the age of majority. The Court could not have reached that result without rejecting the agrument. Any doubt about whether the Court actually passed upon the question should be removed by an examination of Mr. Justice Boyd's dissenting opinion.

The dissent documents the fact that the Florida Supreme Court has never before affirmed the death sentence of a defendant who was a minor at the time of the offense, but specifically notes "that is not to suggest that the death penalty should never be imposed upon a minor". Thus it is clear from express language of the dissent as well as the natural implication of the majority opinion that the Florida Court did not believe that the constitution invariably forbids the execution of minors.

Any inquiry into the how or when the question was raised in the Florida courts is irrelevant to the exercise of this Court's jurisdiction in view of the fact that the Florida Supreme Court actually passed upon the issue. There can be no

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[1] Counsel first learned of the Court's intentions to consider the issue upon reading a report of the November 2, 1981 oral argument in Eddings three days before the November 5, 1981 oral argument to the Florida Supreme Court in this case.

[2] This factual statement was prepared after a review of the tape recording of the oral argument which remains on file in the office of the Clerk of the Florida Supreme Court.

question as to the proper presentation of a federal claim when the highest state court passes on it. Raley v. Ohio, 360 U.S. 423 (1959) This Court has explained that there should be no concern with the propriety of raising the federal question if the issue was actually disposed of by the state court. Whitney v. California 274 U.S. 357 (1927), Coleman v. Alabama 377 U.S. 129 (1914).

The Respondent would have the Court take far too technical a view of the rule in any event. This is not such a case as Illinois v. Gates _____ U.S. _____ (No. 81-430) where the Petitioner failed to make even a general presentation of the issue. Rather it is a death penalty case wherein the Petitioner has been arguing all along that his sentence of death was imposed in violation of the constitution in part because of his age. At the very least it could be said that the substance of the constitutional claim has been presented in the state tribunal. Picard v. Conner 404 U.S. 270 (1971).

The need for plenary review of this case is highlighted by the Respondent's inability to address the merits of Petitioner's constitutional claim. The procedural defense that the issue was not raised as precisely as may have been possible should be rejected as a reson for denying the Writ. For these reasons and those more fully expressed in the Petition the Petitioner Magill respectfully submits that the Writ should be granted.

II

The Respondent contends that the Petitioner's argument concerning exclusion of a juror for cause (Petition Point One) and the exclusion of Petitioner's penalty phase testimony (Petition Point Two) constitute an "improper ground upon which to seek certiorari review" because they were presented in the

earlier Petition for Writ of Certiorari denied by this Court in Magill v. Florida, 450 U.S. 927 (1981).[3] Petitioner respectfully submits the Court should reject this argument as it is predicated upon a legal premise which is clearly incorrect.

An Order denying Petition for Writ of Certiorari does not set a precedent. Nor can it be said that such an Order is res judicata between the same parties in subsequent proceedings. It is now well settled that "the denial of a writ of certiorari imports no expression of the opinion upon the merits of the case." Hughes Tool Company v. Transworld Airlines, 409 U.S. 363 (1973). As Mr. Justice Frankfurter noted in Darr v. Burford, 339 U.S. 200 (1950):

> Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were case here the merits would go against the Petitioner...
>
> To attach significance to a denial of a certiorari petition regarding the merits of the issues raised by the Petition would be to transform a mechanism for keeping cases out of this court into a means of bringing them in. It would contradict all that led to the adoption of certiorari jurisdiction and would reject the whole course of the Court's treatment of such petitions, both in practice and profession. For if denial does import an expression of opinion upon the merits of the case, then we must deal with the merits of the case. Darr v. Burford at 227, 228.

In this case the Court may very well have declined to review the first opinion of the Florida Supreme Court (affirming Petitioner's conviction but remanding the case for resentencing) upon the ground that it was not a final

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[3] Petitioner's Brief in Opposition Page 3.

judgment. Even if that were not the case the Court may have declined review for a variety of other reasons unrelated to the correctness of the Florida Supreme Court's opinion. For these reasons the Respondent is in error in the assertion that Points Two and Three of the Petition are based upon an "improper ground" upon which to seek certiorari review.

III

All of the other arguments contained in the Respondent's Brief in Opposition have been addressed in the Petition itself. As to these points the Petitioner Magill relies upon the arguments originally made.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PHILIP J. PADOVANO
1020 East Lafayette Street
Post Office Box 873
Tallahassee, Florida 32302
904/224-3636

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail this Barbara Ann Butler, Assistant State Attorney, Suite 513, Duval County Courthouse, Jacksonville, Fl 32202 this 30th day of June, 1983.

Attorney